

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

Beaumont Division

JUL 28 2016

JOHNNY JACKSON,
Complainant,

V.

ASST. U.S. ATTORNEY'S OFFICE FOR THE
NORTHERN DISTRICT OF ILLINOIS,
Respondent.

) Case no. 1:16cv308 BY DEPUTY

MC / KFG

**MOTION TO ENJOIN THE ASSISTANT UNITED STATES ATTORNEY OFFICE FROM IMPROPERLY
WITHHOLDING AGENCY RECORDS, AND TO ORDER THE PRODUCTION OF THE IMPROPERLY
WITHHELD DOCUMENTS.**

Comes now, the Complainant Johnny Jackson acting pro-se, pursuant to Haines vs. Kerner, 404 U.S. 519, 30 L.Ed. 2d 652 (1972), requesting this Honorable Court to order the production of improperly withheld documents. For the following reasons the Complainant is entitled to relief:

JURISDICTION:

Jurisdictional authority to devise a remedy and enjoin agencies can be invoked under U.S.C. § 552(a)(B). Kissinger vs. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed. 2d 267 at 150. The Complainant properly invokes this authority.

FACTS OF THE CASE:

On February 14th, 2013, the complainant's Freedom of Information request, (No. ORACL-2015-03129/FOIA-2013-78), requesting a copy of the government motion to dismiss prior to trial, in criminal case no. 95-CR-508-6 was received by the U.S. Dept. of Justice, (Executive office for the United States Attorney's), located at 600 E. Street N.W., Suite 7300, Bicentennial Building, Washington, DC 20530-0001. (see exhibit A).

The document requested was in relation to counts 2 through 5, 10, 12, 13 through 18, and count 38, counts that were dismissed in the complainant's criminal case on a government's motion to dismiss. The FOI request was asking for responsive records of this motion.

After not receiving the responsive records, the complainant filed an appeal. (see exhibit B). The appeal states that the search was adequate yet no responsive records were forthcoming.

This lawsuit follows.

Analysis

Fed.R.Crim.P. 48 governs the dismissal of counts/indictment in a criminal case in federal court:

Rule 48

(a) by the Government. The Government may, with leave of the court, dismiss an indictment, information, or complaint.

The Government may not dismiss the prosecution during trial without the defendant's consent.

It is well established in federal prosecutions that in order to dismiss an indictment, (or a count in the indictment), the Government must have leave and file a motion to dismiss.

In the Complainant's criminal case, he was originally indicted on 40 counts. Taking a look at the Complainant's Co-defendant's judgment and commitment, signed by Judge Harry D. Leinenweber, it is clear that conviction was entered on counts 3-4, 11, 14, 19-37,

and 39-40.(see exhibit C). It also states on the Judgement, that: "all remaining counts of the superseding indictment and original indictment are dismissed on the motion of the United States."

Therefore, pursuant to Fed.R.Crim.P. 48, a motion dismiss the remaining counts was filed by the Government. These counts are as previously stated: counts 2-5,10,12,13-18, and 38. This material fact is proven by the legal document and also by exhibit D, which is a a copy of the Complainant's criminal docket sheet revealing that Judgment of guilt was returned on various counts and not on others. Exhibit E is page 3 of the Complainant's PSR,(generated by the Federal Probation Dept.), showing that count 2 was "dismissed upon a motion by the Government." Also see Exhibit F, which is page 2 of the PSR showing that: "prior to trial, the Government moved to dismiss counts 2-5,10,12,13 through 18, and 38 as to the defendant."

It is clear that the Government,(Assistant United States Attorney's Office for the Northern District of Illinois), did file a motion to dismiss the listed counts and is in possession of the responsive documents requested by the Complainant.

FOI---U.S.C. § 552

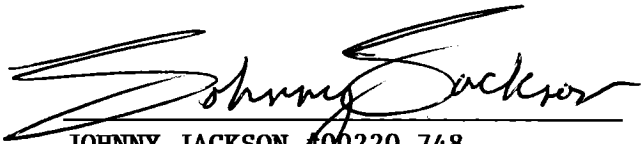
§552 mandates that agency records be turned over to a requester with 9 exceptions. The document requested here does not fall within any of those exceptions. It is of no moment that the United States Attorney Office doesn't have possession of requested document. Their office filed the document in District Court, and the "fact that an agency may no longer be in physical possession of record is not determinative, if agency notes what records given request is directed towards, knows where those records are located and is able to produce them, 5 U.S.C.S § 552 requires that it do so." Tax Reform Research Group v. IRS, (1976,DC Dist Col) 419 F.Supp 415, 76-2 USTC 9558, 38 AFTR 2d 5601.

Here, the Government produced the requested document during the Complainant's criminal proceedings. It is clear the document exists, and is within the Government's possession. It is improper for the document to be withheld.

CONCLUSION

The Complainant prays this honorable court order the Assistant United States Attorney's Office to produce their Motion to Dismiss, in relation to the counts dismissed in his criminal case no. 95-CR-508-6, in which they filed themselves. The Complainant has demonstrated that the document does exist, and based on the requested document being a motion to dismiss, it is not within any of the listed exceptions. To withhold the document is improper and prohibited by §552.

DATED: 7-25-2016


JOHNNY JACKSON #00220-748

CERTIFICATE OF SERVICE

I swear under penalty of perjury that the foregoing is true and correct and that this motion was placed in the prison mailing system on 7-25-2016, addressed to the following:

Assistant United States Attorney Office
219 South Dearborn St.
Chicago Illinois, 60604

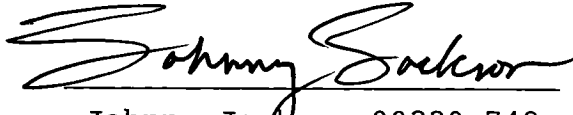

Johnny Jackson 00220-748
USP Beaumont
P.O.Box 26030
Beaumont, TX 77720

EXHIBIT A

U.S. Dept. Of Justice letter dated Feb. 22, 2016 acknowledging receipt of Complainant's FOI request for documents, and processing of said request.



U.S. Department of Justice

Executive Office for United States Attorneys

Freedom of Information & Privacy Staff

600 E Street, N.W.

Suite 7300, Bicentennial Building

Washington, DC 20530-0001

(202) 252-6020 FAX: 252-6047 (www.usdoj.gov/usao)

February 22, 2016

Johnny Jackson
#00220-748
USP, P.O. Box 26030
Beaumont, Texas 77720

Re: Request Number: ORACL-2015-03129/FOIA-2013-78
Date of Receipt: February 14, 2013
Subject of Request: Self (Johnny Jackson) motion to dismiss

Dear Jackson:

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Office. To provide you with the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

All of the records you seek are being made available to you. We have processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. This letter is a full release.

☒ A review of the material revealed: Public Documents

☐ Our office located records that originated with another government component. **These records were found in the U.S. Attorney's Office files.** Once we have received the above payment, these records will be referred to the following component(s) listed for review and direct response to you: _____

☐ There are public records which may be obtained from the clerk of the court or this office, upon specific request. If you wish to obtain a copy of these records, you must submit a new request. These records will be provided to you subject to copying fees.

☐ Please note that your original letter was split into separate files ("requests"), for processing purposes, based on the nature of what you sought. Each file was given a separate Request Number (listed below), for which you will receive a separate response: _____

☐ See additional information on next page.

This is the final action on this above-numbered request. If you are not satisfied with my response to your request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Please note that OIP is in the process of transitioning from its current eFOIA portal to the portal on FOIAonline. Please visit the link above for instructions for submitting an appeal electronically. Your appeal must be postmarked or transmitted electronically within sixty (60) days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." If you are dissatisfied with the results of any such administrative appeal, judicial review may thereafter be available in U.S. District Court, C.F.R. § 16.9.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan B. Gerson", with a stylized flourish at the end.

Susan B. Gerson
Assistant Director

Enclosure(s)

EXHIBIT B

Handwritten appeal of the Complainant and Letter from U.S. Dept.
of Justice resolving the Complainant's appeal.

Freedom of Information Act Appeal.

Johnny Jackson

Criminal

00220-748

Case NO: 95-CR-508-6

USP

P.O. BOX- 26030

Beaumont, TX 77720

Request Number: ORACL-2015-03129/FOIA-2013-78

Subject of Request: A copy of the Government Motion to Dismiss prior to trial.

This is a Appeal from the above requested Documents.

Mr. Jackson Appeal and request a copy of the United States Attorney's (Government) Motion to Dismiss prior to trial counts 2, 5 through 10, 12, 13 through 18, and 38. (See Exhibit - A & B)

Dated

Respectfully Requested

2-29-16

Johnny Jackson



U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

July 4, 2016

Mr. Johnny Jackson
Register No. 00220-748
United States Penitentiary
Post Office Box 26030
Beaumont, TX 77720

Re: Appeal No: DOJ-AP-2016-002093
Request No. ORACLE-2015-03129
CDT:JNW

VIA: U.S. Mail

Dear Mr. Jackson:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your Freedom of Information Act request for access to certain records located in the United States Attorney's Office for the Northern District of Illinois concerning your criminal case, No. 95-cr-508-6. I note that you have limited your appeal to the adequacy of EOUSA's search for responsive records, specifically records pertaining to a Motion to Dismiss certain counts.

After carefully considering your appeal, I am affirming, on partly modified grounds, EOUSA's action on your request. Please be advised that after providing you with two hours of search time, EOUSA could locate no responsive records subject to the FOIA in its files.¹ However, as a courtesy to you, EOUSA provided you with other public records related to your criminal case. I have determined that EOUSA's response was correct and that it conducted an adequate, reasonable search for responsive records.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of EOUSA in response to your request. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

¹ I note that in your letter to EOUSA dated May 31, 2013, you opted to receive your statutory entitlements of two hours of search time and up to 100 pages at no cost to you. To the extent that you are willing to pay for additional search time and would like EOUSA to continue its search, please contact EOUSA directly.

- 2 -

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

X 

Christina D. Troiani, Associate Chief, for
Sean O'Neill, Chief, Administrative Appeals Staff

EXHIBIT C

Judgment and commitment of William Edwards.(Complainant's co-defendant).

Case 1:95-cr-00508 Document 904 Filed 05/21/2009 Page 13 of 25
 Case 1:95-cr-00508 Document 893 Filed 05/12/2000 Page 1 of 6

AO 245 (3/95) Sheet 1 - Judgment In a Criminal Case

United States District Court

For the Northern District of Illinois Eastern Division

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

William Edwards

Case Number: 95 CR 508-5

John M. Cutrone

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) 1, 3, 4, 11, 14-39, 19 through 37 and 40 of the superseding indictment.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
USC 846	Narcotics Conspiracy	1995	One
USC 861(a)(1)	Use of Persons under Age 18		Three & Four
USC 841(a)(1)	Distribution of Cocaine		Eleven & Fourteen
USC 841(a)(1)	Distribution of Cocaine		39
USC 843(b)	Use of a Communication Facility in the Narcotics Conspiracy		19 thru 37
USC 924(c)	Use of a Firearm in the Commission of a Drug Trafficking Crime		40

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____.
- All remaining counts of the superseding indictment and the original Count(s) indictment are dismissed (are) dismissed on the motion of the United States.
- ALSO- The government's oral motion at time of sentencing all counts except Count 1.
- IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 358-999-9999Defendant's Date of Birth: 1/1/1950Defendant's USM No.: 00212-424

Defendant's Residence Address:

3739 South Federal - Apt. 1012Chicago, Illinois 60609

Defendant's Mailing Address:

May 12, 2000
Date of Imposition of Judgment

Signature of Judicial Officer

Judge Harry D. Leinenweber

Name & Title of Judicial Officer

June 1, 2000
Date

123

EXHIBIT D

Complainant's criminal docket sheet.

		suppress evidence is denied [657-3]. Defendant's motion in limine to exclude reference to certain Gangster Disciple literature is denied [660-1]. Defendant's motion to strike paragraph 14 of the indictment is denied [660-2]. Entered Memorandum Opinion and Order. Mailed notice (kmt) (Entered: 05/08/2000)
05/15/2000	<u>674</u>	MINUTE ORDER of 5/15/00 by Hon. Harry D. Leinenweber as to Johnny Jackson : Trial begins-jury. Jury trial held; continued to 5/24/00 at 10:00 a.m. No notice (meg) (Entered: 05/18/2000)
05/17/2000	<u>675</u>	MINUTE ORDER of 5/17/00 by Hon. Harry D. Leinenweber as to Johnny Jackson : Jury trial held; continued to 5/18/00 at 10:00 a.m. No notice (meg) (Entered: 05/18/2000)
05/18/2000	682	LETTER to Court from Johnny Jackson dated 5/18/00 (meg) (Entered: 05/31/2000)
05/19/2000	678	MOTION by defendant Johnny Jackson in limine to bar certain evidence (kmt) (Entered: 05/25/2000)
05/19/2000	<u>679</u>	MINUTE ORDER of 5/19/00 by Hon. Harry D. Leinenweber as to defendant Johnny Jackson : Jury trial held; continued to 5/22/00 at 10:00 a.m. No notice (kmt) (Entered: 05/25/2000)
05/22/2000	<u>680</u>	MINUTE ORDER of 5/22/00 by Hon. Harry D. Leinenweber as to defendant Johnny Jackson : Jury trial held. Deliberations begin. No notice (kmt) (Entered: 05/25/2000)
05/23/2000	683	JURY Instructions (meg) (Entered: 05/31/2000)
05/23/2000	<u>684</u>	VERDICT as to Johnny Jackson (pmp) (Entered: 05/31/2000)
05/23/2000	<u>685</u>	MINUTE ORDER of 5/23/00 by Hon. Harry D. Leinenweber as to Johnny Jackson : The jury find the defendant Johnny Jackson, guilty as charged in counts 1,4,19,20,22,23,25,26,27,29,30,31,32,33,34,35 and 36 of the superseding indictment and not guilty as charged in counts 3,4,11,21,24,28,37,39 and 40 of the superseding indictment. Judgment of guilty entered. Cause referred to the Probation Department for a presentence investigation. Sentencing set for 09/29/2000 at 9:45 a.m. Trial ends-jury Mailed notice (pmp) (Entered: 05/31/2000)
05/23/2000	687	JURY questions as to defendant Johnny Jackson (kmt) (Entered: 06/02/2000)
05/30/2000	681	UNOPPOSED MOTION by Johnny Jackson to extend time to file post-trial motions (meg) (Entered: 05/31/2000)
05/30/2000	<u>686</u>	MINUTE ORDER of 5/30/00 by Hon. Harry D. Leinenweber as to Johnny Jackson : The unopposed motion for a 28 day extension of time to file post-trial motions is granted [681-1] Mailed notice (pmp) (Entered: 05/31/2000)
06/07/2000	701	MOTION by defendant Johnny Jackson for an order approving copying expenses, nunc pro tunc (Attachment) (kmt) (Entered: 06/30/2000)

EXHIBIT E

Page 3 of Complainant's PSR (criminal case No. 95-CR-508-6

ADDENDUM - Page 3

RE: JACKSON, Johnny
Docket No. 95 CR 508-6

The appellate court went on to hold that this is all Apprendi would have required and that "...even assuming that Apprendi requires us to reconsider Jackson, any error in this case was harmless." The appellate court added that no ruling as to the validity of Jackson was made and instead opted to reserve such judgment for a future case of which such a decision would be a deciding factor.

In the instant case, Count One charged the defendant with conspiracy to distribute a controlled substance, with no mention of quantities with regard to the marijuana, cocaine, cocaine base, and heroin possessed and distributed. Count 14 charged that the defendant possessed 10 grams of cocaine with the intent to distribute. The remaining counts, all of which charged the defendant with the use of a communications facility to facilitate a controlled substance offense, do not set forth specific drug quantities within the indictment.

Thus, the present case differs from Jackson in that the instant indictment provided no specific drug quantities, aside from the ten grams of cocaine within Count 14. In Cavender, the appellate court acknowledged that Apprendi requires some specificity with regard to drug amounts within charging documents, yet at the same time refused to reconsider the holding in Jackson that the quantity of a drug is a sentencing factor which need not be included in an indictment. However, the instant case differs from Apprendi in that the imprisonment sentencing range reflected within the instant presentence report is life imprisonment, which is equal to the statutory maximum penalty of life imprisonment for Count One.

In U.S. v. Smith, 223 F.3d 554 (7th Cir. 2000), the appellate court held that the statute requiring a mandatory sentence of life imprisonment for persons convicted of engaging in a continuing criminal enterprise constituted a sentencing factor and not an element of the offense. Several defendants in this appellate case were convicted of 21 U.S.C. §848(a) in connection with the distribution of drugs by the Gangster Disciples street gang.

The instant case differs from Smith, in that a similar count, Count Two which charged Johnny Jackson with 21 U.S.C. §848(a), was dismissed upon a motion by the government. However, the holding of Smith to reject the defendant's arguments that the indictment should have specifically charged that they satisfied the criteria of §848(b), which greatly enhanced the maximum term of imprisonment and that the jury should have found those facts beyond a reasonable doubt, is analogous to the present case.

The undersigned reviewed another recent Seventh Circuit decision which cited Apprendi, U.S. v. Hernandez, 2000 WL 1253528 (7th Cir.). In Hernandez, the defendant, convicted of kidnaping and conspiracy to kidnap, appealed the sentence he received and argued that the guideline adjustments that enhanced his sentence represented elements of the offense rather than sentencing factors. The appellate court in Hernandez rejected the defendant's claim and held that the "...fact that different levels under the statutory maximum depend on proof of various aggravating facts is not enough to make those facts "elements of the offense" rather than "sentencing factors." Again, although the circumstances of this case are markedly different than the instant case, the appellate court's ruling is analogous.

Exhibit G

EXHIBIT F

Page 2 of Complainant's PSR (criminal case)

JACKSON, Johnny
Docket No. 95 CR 508-6

Count 40 charged that, on or about October 15, 1994, the defendant, Larry Hoover, Gregory Shell, Andrew Howard, William Edwards, Jerry Strawhorn, Tirenzy Wilson, used and carried a firearm and caused the use and carrying of a firearm, namely a Colt Official 38 Police Special, serial number 712129, during and in relation to the commission of a drug trafficking crime, 21 U.S.C. §846; in violation of 18 U.S.C. §924(c).

From March 19, 1997 through May 9, 1997, a jury trial was held with regard to the codefendants.

On January 27, 2000, after several years as a fugitive, Johnny Jackson was arrested pursuant to a previously issued bench warrant within the Eastern District of Wisconsin. On January 28, 2000, Mr. Jackson appeared before the Honorable William E. Callahan, Jr. and was ordered to remain in custody pending a detention hearing within the Northern District of Illinois. The defendant made his initial appearance before the Honorable Harry D. Leinenweber on February 8, 2000 and was remanded to federal custody, where he has remained up to the present writing.

* Prior to trial, the government moved to dismiss Counts 2, 5 through 10, 12, 13 through 18, and 38 as to the defendant. From May 15, 2000 through May 23, 2000, a jury trial was held with regard to defendant's alleged criminal conduct. On May 23, 2000, a jury verdict of guilty was returned for Counts 1, 14, 19, 20, 22, 23, 25, 26, 27, and 29 through 36. The defendant was found not guilty as to Counts 3, 4, 11, 21, 24, 28, 37, 39, and 40. A judgment of guilty was entered by the Court and the matter was referred to the probation office for a presentence investigation and report. Sentencing was scheduled for September 29, 2000, at 9:45 a.m.

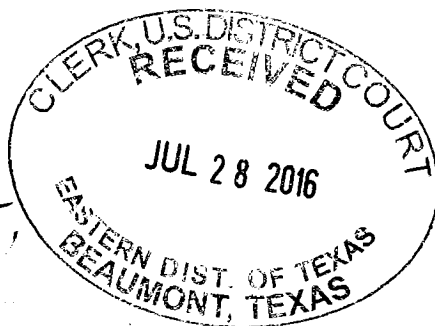
The Offense Conduct

The following information with regard to the instant offense was obtained from the government's detailed version of the offense, a copy of which is attached to this report. In addition, an interview was conducted with Agent Jim Needles of the Bureau of Alcohol, Tobacco, and Firearms (BATF), who corroborated the factual account of the offense as described below. The defendant was instructed as to the option of submitting a written version of the instant offense, which has not been received as of this writing.

Larry Hoover, Gregory Shell, Andrew Howard, Jerry Strawhorn, and Tirenzy Wilson were the principal administrators and leaders of the Gangster Disciples. The gang's hierarchy included board members, governors, assistant governors, regents, coordinators and soldiers, with decreasing levels of authority and responsibility.

Gregory Shell and Andrew Howard were board members and were responsible for the overall operation of the Gangster Disciples in Chicago, Illinois, and the surrounding suburbs. As board members they were confidants of Larry Hoover and were second in command only to him. Jerry Strawhorn and Tirenzy Wilson were governors, who in turn supervised approximately 1,000 gang members. Adrian Bradd and Darrell Branch were independent suppliers and confidants of Larry Hoover.

7-25-2016



Dear Clerk of Court,

Could you please forward me a stamped copy back?

Thank you

Johnny Foster